Supreme Court, U.S.
FILED
APR 23 1980
MICHAEL RODAK, JR., CLERK

No. 79-1636

In the Supreme Court of the United States

OCTOBER TERM, 1979

WILLIAM W. WINPISINGER, ET AL., PETITIONERS

v.

JACK WATSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

ROBERT E. KOPP
ANTHONY J. STEINMEYER
PAUL BLANKENSTEIN
JOHN F. CORDES
Attorneys
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1636

WILLIAM W. WINPISINGER, ET AL., PETITIONERS

v.

JACK WATSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is not yet reported. The opinion of the district court (Pet. App. 18a-22a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1980. The petition for a writ of certiorari was filed on April 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners, who are supporters of Senator Edward M. Kennedy's presidential campaign, have standing to challenge activities of respondent federal officials allegedly designed to influence the Democratic Party nomination process.

2. Whether the court of appeals correctly determined that prudential considerations bar petitioners' suit.

STATEMENT

Petitioners are supporters of Senator Edward M. Kennedy's campaign for the Democratic Party presidential nomination. They claim, in essence, that respondents—various Cabinet and White House officials and the Carter-Mondale Presidential Committee[1]—are improperly attempting to influence the nomination process through their policy decisions and use of federal money for political purposes. Petitioners' 33-page complaint refers to a myriad of allegedly politically-motivated activities by respondent government officials (see Pet. App. 3a-8a). These examples include the award of federal grant and loan money to the states of Florida, Maine, and Rhode Island and to the cities of Detroit, New York, and East St. Louis, and the refusal to award federal money to the cities of Chicago and Carbondale, Illinois (Pet. 4-9). Petitioners also emphasize the political campaigning of government officials (*ibid.*) and, relying primarily on newspaper articles, level the new charge that "someone" had "bought" the endorsement of President Carter by a New York newspaper publisher (Pet. 9-10).

---

[1]This brief is submitted on behalf of the respondent federal officials. The Carter-Mondale Campaign Committee is separately represented.

The district court dismissed petitioners' suit for lack of standing (Pet. App. 18a-22a). The district court characterized petitioners' claim of diluted electoral influence as "vague and abstract" (*id.* at 20a) and stated that petitioners' "inability to influence the elections process, or to induce support for Senator Kennedy may turn on a number of factors that are unrelated to [respondents'] alleged abuse" (*id.* at 21a). The court therefore concluded that petitioners "lack standing in the constitutional sense" (*ibid.*).

The court of appeals affirmed per curiam (Pet. App. 1a-17a). Emphasizing that standing requires "a 'fairly traceable' causal connection between the claimed injury and the challenged conduct" (*id.* at 11a),[2] the court of appeals observed that the "endless number of diverse factors potentially contributing to the outcome of state presidential primary elections, caucuses and conventions forecloses any reliable conclusion that voter support of a candidate is 'fairly traceable' to any particular event" (*id.* at 11a-12a). "Courts are powerless to confer standing," the court of appeals concluded, "when the causal link is so tenuous" (*id.* at 12a). In addition, the court recognized that the relief sought by petitioners would require the courts to scrutinize "virtually every discretionary decision made by the Administration acting through * * * high government officials" (*id.* at 13a), and would "interject" the court "into practically every facet of the Executive Branch of the federal government, on a continuing basis, for the purpose of appraising whether considerations

---

[2]Quoting *Duke Power Co.* v. *Carolina Env. Study Group, Inc.*, 438 U.S. 59, 72 (1978), and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977).

other than pure public service motivated a particular [respondent] in the performance of his or her official duties" (*ibid.*). Such constant judicial oversight, ruled the court, would run counter to the separation of powers doctrine and raised an insurmountable "prudential barrier" to the maintenance of petitioners' suit (*id.* at 12-17a).

ARGUMENT

Petitioners seek review of the holdings below that they lack standing and that, in any event, prudential considerations bar their suit.[3] The decision of the court of appeals, however, is anchored in settled precedent and good sense. Review by this Court is unwarranted.

1. In order to satisfy the standing requirement, a plaintiff must demonstrate that (i) he has suffered injury in fact that is concrete rather than abstract, *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 221-223 (1974), and is "distinct and palpable * * * to himself * * *," *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975), and (ii) there is a "fairly traceable" causal link between the claimed injury and the challenged conduct. *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979); *Duke Power Co.* v. *Carolina Env. Study Group, Inc.*, 438 U.S. 59, 72 (1978); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

---

[3]The complaint suggests that respondents' challenged conduct violates certain statutes. None of these statutes contains an express private right of action, and it is doubtful in light of this Court's recent decisions that an implied private right of action may appropriately be implied. See, *e.g.*, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, No. 77-1645 (Nov. 13, 1979).

The gravamen of petitioners' complaint is, as the court of appeals noted (Pet. App. 10a), the "dilution of [petitioners'] efforts on Senator Kennedy's behalf" as a result of the challenged conduct. Even assuming that this injury is sufficiently concrete, distinct and palpable to satisfy the first prerequisite—a doubtful assumption rejected by both courts below[4]—there is no "fairly traceable" connection between this alleged injury and the challenged activities of respondents. As the court of appeals observed (*id.* at 11a-12a), "[t]he endless number of diverse factors potentially contributing to the outcome of state presidential primary elections, caucuses and conventions forecloses any reliable conclusion that voter support of a candidate is 'fairly traceable' to any particular event." In short, it is nothing more than "unadorned speculation" to suggest that the alleged conduct has had or will have any appreciable impact on petitioners' efforts on behalf of Senator Kennedy. *Simon* v. *Eastern Kentucky Welfare Rights Org.*, *supra*, 426 U.S. at 44; *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 618 (1973); *Warth* v. *Seldin*, *supra*, 422 U.S. at 507. Compare

---

[4]Petitioners claim (Pet. 11) that the court of appeals rejected *sub silento* the district court's holding that the type of injury relied on by petitioners was not sufficiently concrete to establish injury in fact. To the contrary, the court of appeals expressly approved this holding of the district court (Pet. App. 10a).

Arlington Heights v. *Metropolitan Housing Dev. Corp.*, *supra*, 429 U.S. at 264 (sustaining standing because there was at least a "substantial probability" that the relief sought would ameliorate the plaintiff's injury).[5]

Petitioners contend (Pet. 15) that the court of appeals held that the requisite degree of causality can be established only by demonstrating that Senator Kennedy would win the Democratic nomination "but for" respondents' alleged conduct. This is not so. The court of appeals merely held (Pet. App. 11a-12a) that petitioners' theory of causality was "so tenuous" that the alleged injury was not "fairly traceable" to the alleged conduct. The court required no more than a fair and substantial relationship between the alleged injury and the challenged conduct. The court did not require "but for" causality or require a showing that in the absence of any violations Senator Kennedy would win any primary, caucus, or convention.

Petitioners' argument (Pet. 15-16) is not improved by the fact that voters have standing to challenge the malapportionment of legislatures and the stuffing of ballot boxes. See *Baker* v. *Carr*, 369 U.S. 186, 204-208

[5]In an apparent effort to address their failure to establish a causal nexus between the alleged injury and the challenged conduct, petitioners characterize (Pet. 12) their injury as simply an injury to their interest in supporting a candidate in an election free of any irregularities. Because every campaign irregularity has a direct impact on this interest, petitioners suggest that they have satisfied the causality element. The flaw in this approach is that any such interest in error-free campaigns—irrespective of whether any irregularities "in fact" injure petitioners' efforts in a concrete way—is nothing more than an assertion of an interest common to all citizens. So defined, that interest, lacking as it does any concrete connection to petitioners' endeavors, is too abstract to satisfy the standing requirement.

(1962), and cases cited therein. In such cases, the causal relationship between the dimunition of the franchise and the challenged action is clear and does not depend on "unadorned speculation." Malapportionment, for example, reduces the effectiveness of a vote by a degree capable of precise mathematical expression. In sharp contrast, there is no reasonably certain theory that could possibly correlate respondents' alleged actions with the effectiveness of ballots cast for Senator Kennedy.

2. The court of appeals also correctly barred this suit for the soundest of prudential reasons. Petitioners' suit, if allowed to proceed, would necessarily require (i) discovery, (ii) trial, and (if successful) (iii) judicially-supervised relief—all unavoidably entailing detailed and continuous judicial inquiry into the nature of, motivations for, and political impact of "virtually every discretionary decision" of the President, his assistants, Cabinet officers and many other senior officers of the Executive Branch (Pet. App. 13a). This inquiry presumably would comprehend the full length of the campaign. On petitioners' theory, for example, whenever an Administration official traveled or made a speech, ostensibly for policy reasons, the extent of his "political" motivation would be an issue for the courts. And, whenever an agency granted federal aid to one geographic area, or denied it to another area, the courts would have to evaluate the responsible officials' motivation. Such unprecedented,[6] daily supervision of the entire Administration not only would be unmanageable

[6]No decision of any court has ever suggested so sweeping a judicial oversight of the executive function. The decisions cited by petitioners (Pet. 16-17 n.14) approved only narrow injunctions or subpoenas directed to the Chief Executive or senior officials solely with respect to an isolated action.

and ineffective, but also would inflict substantial damage on the principle of separation of powers. See *Schlesinger* v. *Reservists to Stop the War*, *supra*, 418 U.S. at 222; *O'Brien* v. *Brown*, 409 U.S. 1, 4-5 (1972).[7] Prudence counsels against any such undertaking.

3. Finally, petitioners' claim (Pet. 20) that the court of appeals' decision "squarely conflicts" with *Shakman* v. *Democratic Organization of Cook County*, 435 F. 2d 267 (7th Cir. 1970), cert. denied, 402 U.S. 909 (1971), is incorrect. While *Shakman* suggests that a local candidate may have standing to challenge local patronage practices which put him at an "electoral disadvantage," that suggestion is dubious in light of this Court's subsequent decisions in *Simon*, *Warth*, and other cases clarifying the causality requirement and the role of prudential considerations.[8] More recently, the Seventh Circuit, in *Mulqueeny* v. *National Commission on the Observance of International Women's Year*, 549 F. 2d 1115, 1121 (1977),

---

[7] *Elrod* v. *Burns*, 427 U.S. 347 (1976), and *Branti* v. *Finkel*, No. 78-1654 (Mar. 31, 1980), are not in conflict with the decision below. In those cases, (i) the injury was concrete (loss of job) and directly related to a firing decision based solely on party affiliation, and (ii) effective and manageable relief was plainly possible by a narrow declaration that the discharge policy was unlawful. *Elrod* and *Branti*, while supporting the proposition that certain abuses of political patronage may be remedied by the courts, involved no question of standing, prudential or otherwise, and in no sense authorized petitioners to pursue their broad attack upon the nomination process.

[8] The most recent opinion on remand in *Shakman* holds that a candidate may not assert the employment rights of public employees and applicants for public employment merely because violations of those rights make it more difficult for the candidate to win an election. *Shakman* v. *Democratic Organization of Cook County*, 481 F. Supp. 1315, 1329 (N.D. Ill. 1979).

has held that a group lacked standing to challenge an agency's alleged violations of law that the group felt obstructed their efforts to defeat legislation concerning the Equal Rights Amendment. The court held that the group's interest was merely an abstract interest in a political issue and that, in any event, it was "wholly conjectural" whether there was any relationship between the agency's conduct and the alleged harm.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

ROBERT E. KOPP
ANTHONY J. STEINMEYER
PAUL BLANKENSTEIN
JOHN F. CORDES
Attorneys

APRIL 1980

DOJ-1980-04